

21

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
QUEEN CITY SHEET METAL)
AND ROOFING, INC.,)
Appellant,)
v.)
PUGET SOUND AIR POLLUTION)
CONTROL AGENCY,)
Respondent.)

PCHB No. 78-245

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the issuance of two \$250 civil penalties for the alleged violation of Regulation I, came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, at a formal hearing on January 12, 1979, in Seattle, Washington. Hearing examiner Nancy E. Curington presided.

Appellant appeared by Jerry Puetz and Oscar W. Puetz, part owners; respondent was represented by its attorney, Keith D. McGoffin. Reporter Susan Cookman recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From

NC/LB

1 testimony heard and exhibits examined, the Pollution Control Hearings
2 Board makes these

3 FINDINGS OF FACT

4 I

5 Respondent, pursuant to RCW 43.21B.260, has filed with this Board
6 a certified copy of its Regulation I containing respondent's regulations
7 and amendments thereto, of which official notice is taken.

8 II

9 On October 6, 1978 at approximately 1:30 p.m., respondent's
10 inspector, in response to a complaint, visited the corner of Third
11 and Jefferson Streets in downtown Seattle. He observed appellant's
12 roofing operations at the Morrison Hotel consisting in part of a kettle
13 used to heat asphalt, on the sidewalk beside the hotel. Respondent's
14 inspector took movies of an emission from the kettle, and recorded an
15 opacity of 30-100% for six of six minutes. The lid of the kettle
16 was open one minute, during which time the opacity was 100%. As
17 a result, appellant was issued Notice of Violation No. 15453 of
18 Section 9.03(b)(2) of Regulation I (R-5), for which a \$250 civil
19 penalty was subsequently assessed (Notice of Civil Penalty No. 4023)
20 (R-6).

21 III

22 On October 17, 1978 at approximately 3:00 p.m., respondent's
23 inspector again visited the site, to conduct a follow-up inspection.
24 He took three photographs and recorded an opacity of 100% from
25 appellant's kettle for six of six minutes. The lid of the kettle
26 was open for the entire period, while a workman swept the pavement

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 around the kettle. As a result, appellant was issued Notice of Violation
2 No. 15461 of Section 9.03(b)(2) of Regulation I (R-10), for which a
3 \$250 civil penalty was subsequently assessed (Notice of Civil Penalty
4 No. 4034) (R-11).

5 IV

6 The construction site has been designated by the Seattle Fire
7 Department as Fire Zone 2, which carries with it a prohibition on
8 the use of asphalt tankers. Appellant received a permit to operate
9 a kettle, after inspection by the fire department. Respondent's
10 witness testified that a "smokeless pot" which in normal operation
11 is capable of meeting the emission standards of Regulation I, is
12 available for use in such areas. Appellant was unaware of such
13 equipment, and will further explore its availability with the agency.

14 V

15 Section 9.03(b)(2) of respondent's Regulation I makes it unlawful
16 for any person to cause or allow the emission of an air contaminant for
17 a period totaling more than three minutes in any one hour which is of
18 an opacity equal to or greater than 20%.

19 Section 3.29 provides for a civil penalty of up to \$250 per day
20 for each violation of Regulation I.

21 VI

22 Any Conclusion of Law which should be deemed a Finding of Fact is
23 hereby adopted as such.

24 From these Findings the Board comes to these

25 CONCLUSIONS OF LAW

26 I

27 Appellant contends that the films and photographs taken by

1 respondent's inspector should not have been taken without prior
2 notification. We assume the appellant's arguments to be based upon
3 the due process provisions of the Washington and the United States
4 Constitutions. Referring to Chemithon Corp. v. Puget Sound Air
5 Pollution Control Agency, 19 Wn. App. 689 (1978), we note that the
6 court stated, "To establish a violation of PSAPCA regulations by
7 observations of smoke emissions from a public area without prior
8 notice to the operator of the plant does not violate the due process
9 clause of the Washington State Constitution, Article 1, Section 3."
10 19 Wn. App. at 696. Consequently, we find that the appellant's arguments
11 have no merit.

12 II

13 On October 6, 1978, appellant violated Section 9.03(b)(2) by
14 causing the emission of white smoke which exceeded the limits
15 established by the regulations. The \$250 civil penalty is reduced
16 to \$100, which amount is a more appropriate penalty under the
17 circumstances of this event.

18 III

19 On October 17, 1978, appellant violated Section 9.03(b)(2) by
20 causing the emission of white smoke which exceeded the limits established
21 by the regulations. The \$250 civil penalty is affirmed in its entirety.

22 IV

23 Any Finding of Fact which should be deemed a Conclusion of Law
24 is hereby adopted as such.

25 From these Conclusions the Pollution Control Hearings Board
26 makes this

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

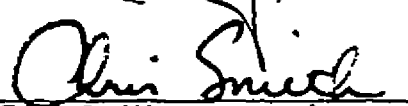
ORDER

The \$250 civil penalty resulting from the Notice of Violation No. 15453 is reduced to \$100 and affirmed. The \$250 civil penalty resulting from Notice of Violation No. 15461 is affirmed.

DATED this 8th day of February, 1979.

POLLUTION CONTROL HEARINGS BOARD


DAVE J. MOONEY, Chairman


CHRIS SMITH, Member

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)	
TOWN OF CATHLAMET,)	
)	
Appellant,)	PCHB Nos. 78-249 and 78-265
)	
v.)	FINAL FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
SOUTHWEST AIR POLLUTION)	AND ORDER
CONTROL AUTHORITY,)	
)	
Respondent.)	

This matter, the appeal of two \$250 civil penalties for outdoor burning allegedly in violation of respondent's Section 4.01 of Regulation I came before the Pollution Control Hearings Board on March 8, 1979 in Longview, Washington. Hearing examiner William A. Harrison presided alone. Appellant was represented by its attorney, Fred A. Johnson. Respondent was represented by its attorney, James D. Ladley. Olympia reporter Jennifer J. Roland recorded the proceedings. Respondent elected a formal hearing pursuant to RCW 43.21B.23

Witnesses were sworn and testified. Exhibits were examined.

WAH/LB

1 The Board having read the transcript of the proceedings, having
2 examined the exhibits, having considered the records and files herein
3 and having reviewed the Proposed Findings of Fact, Conclusions of Law
4 and Order of the Presiding Officer; and

5 The Board having received Exceptions to said Proposed Findings
6 of Fact, Conclusions of Law and Order from the appellant, Town of
7 Cathlamet, on April 10, 1979, and having considered and denied
8 appellant's Exceptions, the Board makes these

9 FINDINGS OF FACT

10 I

11 Respondent, pursuant to RCW 43.21B.260, has filed with this
12 Board a certified copy of its Regulation I containing respondent's
13 regulations and amendments thereto of which official notice is taken.

14 II

15 Appellant, Town of Cathlamet, owns a parcel of land commonly
16 known as the town dump. This is a dumping site for refuse from both
17 the Town and eastern Wahkiakum County.

18 The appellant has entered into a contract with one Stanley
19 Sanitary Service under which Stanley:

20 . . . shall supervise and maintain the city
21 dump, or other place provided for the disposal
22 of such materials, maintaining the same in
23 good condition at all times (Paragraph
24 9, p. 2 of the contract entered into June 1972,
25 Exhibit A-3).

26 The contract also gives Stanley the right to collect fees from members
27 of the public who bring refuse to the town dump and to collect garbage
in the Town of Cathlamet in return for a fee from the residents.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

III

On October 9, 1978 at 12:03 p.m. respondent's inspector, while on route to an air quality monitoring station, saw "billows of white smoke" arising from the town dump. He saw no one at the scene and did not enter the dump site. Rather, he went to the Cathlamet Town Hall and issued a Field Notice of Violation to the Town Clerk, requesting that the fire be extinguished. The smoke impaired the inspector's driving visibility while in Cathlamet and continued without interruption from his first observation until his departure after issuing the Field Notice of Violation.

On November 14, 1978, respondent dispatched another inspector to observe the same site. Arriving at 10:45 a.m. the inspector observed a fire with smoke and visible orange flame which emanated from a pile of garbage and refuse some twenty feet in diameter and located within the town dump. Although he had no search warrant, the inspector observed an open roadway leading into the dump, saw no watchman and proceeded to enter the dump. There he talked with persons, identity unknown, and ascertained that no one from the Town was present on the site. He therefore also drove to the Town Hall in Cathlamet, and issued a Field Notice of Violation to the Town Clerk, requesting that the fire be immediately extinguished. At 9:30 a.m. the following day, November 15, 1978, the fire was still smoldering and smoking.

Respondent did not issue any permit for the fire on either October 9 or November 14, 1978, and both were probably ignited by spontaneous combustion.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 Appellant later received two Notices of Violation each assessing
2 a civil penalty of \$250, total \$500. From these, appellant appeals.

3 IV

4 There is a lengthy prior record of refuse fires in the
5 Cathlamet Town Dump. Respondent has issued field notices of
6 violation to the appellant, concerning such fires, on the following
7 dates:

- 8 1. March 25, 1971
- 9 2. March 16, 1973
- 10 3. July 6, 1976
- 11 4. July 9, 1976
- 12 5. July 12, 1976
- 13 6. July 23, 1976
- 14 7. June 29, 1977
- 15 8. November 23, 1977
- 16 9. February 23, 1978
- 17 10. June 23, 1978

18 In response to this situation, the appellant has provided a cable
19 and padlock across the dump entry road in an attempt to limit those
20 times when the public is admitted to the dump. The appellant has
21 also applied to respondent for a variance to allow open burning at
22 the town dump, which variance was not granted. Presently, the appellant
23 is working with the Cowlitz-Wahkiakum Governmental Conference to
24 develop a Solid Waste Plan. This Plan is scheduled for completion
25 in early 1980 and may eventually result in closure of the present
26 town dump. Efforts to locate a sanitary landfill are hampered, however,
27 by the fact that, according to the Governmental Conference, 95% of
the soil in eastern Wahkiakum County is unsuitable for such a
landfill due to the soil's leaching characteristics. It may prove
feasible to haul Wahkiakum County refuse to a Cowlitz County sanitary

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

landfill.

V

The Board of Wahkiakum County Commissioners signed a written resolution, effective April 15, 1968, activating the respondent's air pollution control authority within Wahkiakum County and all the cities and town within its boundaries. This written resolution was prepared and presented by the Prosecuting Attorney for Wahkiakum County, is attested by the County Auditor, and a certified copy was duly filed, on April 16, 1968, in the Office of the Secretary of State in Olympia.

This written resolution states that the Board of Wahkiakum County Commissioners gave due consideration to existing and future air pollution problems and found that city or town ordinances and county resolutions were then inadequate to prevent or control air pollution. The resolution further states that the Board of Wahkiakum County Commissioners conducted a public hearing on April 8, 1968 in accordance with the then prevailing rule on public meetings, chapter 42.32 RCW. Respondent exercises control of air pollution in Wahkiakum County in reliance upon this document.

The actual minutes of the April 8, 1968, special meeting of the Board of Wahkiakum County Commissioners make no mention of air pollution.

VI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Pollution Control Hearings Board comes
FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 to these

2 CONCLUSIONS OF LAW

3 I

4 Respondent's rule on open burning, Section 4.01 of Regulation I
5 which was cited in the Notices of Violation, provides:

6 Open Fires: No person shall ignite, cause to
7 be ignited, permit to be ignited, or suffer, allow,
8 or maintain any open fire within the jurisdiction
of the Authority, except as provided in this
Regulation.

9 (a) The following fires are excepted from
10 provisions of this regulation:

11 (1) Fires set only for recreational
12 purposes and cooking of food for human
consumption, provided no nuisance is
created.

13 (2) Any fire specifically exempt under
14 Section 42, of Chapter 238, RCW 70.94.250.

15 (b) Open burning may be done under permit:

16 (1) Application for burning permits shall
17 be on forms provided by the local fire
department.

18 (2) No permit shall be issued unless the
Control Officer is satisfied that:

19 (i) No practical alternate method is
20 available for the disposal of the
material to be burned.

21 (ii) No salvage operation by open
22 burning will be conducted.

23 (iii) No garbage will be burned.

24 (iv) No dead animals will be disposed
of by burning.

25 (v) No material containing asphalt,
26 petroleum products, paints, rubber products,
plastic or any substance which normally
emits dense smoke or obnoxious odors will
27 be burned.

1 (3) Any permit issued may be limited by the
2 imposition of conditions to:

3 (1) Prevent air pollution.

4 (11) Protect property and the health,
5 safety and comfort from the effects of
6 the burning.

7 (4) If it becomes apparent at any time to
8 the Control Officer that limitations need
9 to be imposed for any of the reasons stated
10 in Subsection (3) above, the Control Officer,
11 or his duly designated agent shall notify the
12 permittee and any limitation so imposed shall
13 be treated as conditions under which the permit
14 is issued.

15 (c) Fires started in violation of this regulation
16 shall be extinguished by the persons responsible for the
17 same upon notice of the Control Officer or his duly
18 designated agent. When the Control Officer has knowledge
19 of adverse conditions for the dispersement of the by-products
20 of combustion, an air pollution alert may be declared voiding
21 all permits for open fires.

22 (d) It shall be (Prima facie) [sic] evidence that the
23 person who owns or control property on which an open fire,
24 prohibited by this regulation, occurs has caused or allowed said
25 open fire.

26 Appellant, Town of Cathlamet, urges that it did not violate respondent's
27 open burning rule, Section 4.01; and, in addition, advances the
28 defense that respondent does not possess jurisdiction to function
29 within Wahkiakum County and that therefore the Notices of Violation
30 issued by respondent are null and void. At hearing, appellant also
31 challenged the inspector's entry into the town dump on November 14,
32 1978, without a search warrant. We take these up in order.

33 II

34 Section 4.01 of Regulation I. The two outdoor fires in this
35 appeal, October 9 and November 14, 1978, are prohibited by respondent's
36 Section 4.01(b). This is so either because the fires were burned
37

38 FINAL FINDINGS OF FACT,

1 without respondent's permit or because they contained prohibited
2 materials (garbage or other material emitting dense smoke).

3 The respondent has made a prima facie case by showing that these
4 prohibited fires took place on property owned by the appellant.
5 Section 4.01(d). There was further affirmative proof that the fires
6 were not put out promptly. While the appellant did not deliberately
7 set the fires in question, we have long held that one may "cause or
8 allow" a fire by failing to take reasonably prudent precautions to
9 put the fire out. Burlington Northern RR v. PSAPCA, PCHB No. 100
10 (1972), A-1 Auto Wrecking v. PSAPCA, PCHB No. 337 (1973) and Northwest
11 Pipe and Steel v. PSAPCA, PCHB No. 468 (1974). In this case, appellant
12 has not gone forward with proof showing, specifically, that any
13 effort was made to extinguish the two fires involved in this appeal.
14 Moreover, despite the past history of fires at the same site,
15 appellant has not shown that at the times of the two fires now
16 before us any specific plan existed for combating this chronic and
17 recurring type of fire. Such a plan would include, at minimum,
18 a) a means for early detection of the fire and b) a source of water
19 or other fire fighting medium, in adequate supply, on or near the site.

20 Appellant next urges that any omission in this matter is solely
21 that of Stanley Sanitary Services with whom appellant has a contract
22 calling for supervision of the dump where these fires occurred. We
23 disagree. The relation between appellant and Stanley is that of
24 principal and agent and, as such, vicarious liability can be imposed
25 upon appellant for the omissions of Stanley. Gelb v. PSAPCA,
26 PCHB No. 994 (1976). Stanley failed to take reasonably prudent

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

precautions to put out the two fires in question.

Appellant finally urges that it cannot be liable in that it did not "knowingly" cause air pollution as that term is used in RCW 70.94.040 of the State Clean Air Act. We disagree. First, the quantity of smoke coupled with actual notice from respondent establishes that appellant did knowingly cause air pollution via failing to take reasonably prudent precautions to put out the two fires in question which it knew of, notwithstanding that the fires were not knowingly ignited by appellant. Second, it is not necessary to prove that an illegal fire was knowingly caused in order to invoke a civil penalty. Scienter was omitted from the amendment to the State Clean Air Act, chapter 70.94 RCW, which created civil liabilities for violations, indicating the Legislature intended to omit such a requirement for civil violations. RCW 70.94.431. Kaiser Aluminum v. PSAPCA, PCHB No. 1017 (1976).

We conclude that appellant violated respondent's Section 4.01 of Regulation I on both October 9 and November 14, 1978.

III

Geographical Jurisdiction and Search Warrant. Appellant points out that the Board of Wahkiakum County Commissioners' Minutes do not reflect the public hearing required by RCW 70.94.055 and RCW 42.32.010, both as existing in 1968, for activation of respondent air authority. From this, appellant contends that there was no such public hearing or that it was not lawful. We conclude to the contrary. The reason that appellant chooses 1968 to conduct its search of the Commissioners' Minutes is because of the written resolution of that

1 date expressly declaring that a public meeting was held and resolving
2 that the respondent air authority be activated within Waukegan
3 County and all of its cities and towns (Exhibit R-1). This written
4 resolution itself, signed by the Commissioners and filed in the Office
5 of the Secretary of State, is a sufficient written record to prove
6 compliance with the public meeting and minute-keeping requirements
7 of chapters 70.94 and 42.32 RCW.

8 Respondent's inspector observed the prohibited fire from a public
9 roadway on November 14, 1978, which observation required no search warrant.
10 This observation, and other evidence in the case, is sufficient to
11 sustain that violation independently and without resort to the inspector's
12 entry into the town dump. Notwithstanding this, the inspector's entry into
13 the town dump occurred while it was apparently open to the public and no
14 search warrant was required.

15 IV

16 Any Finding of Fact which should be deemed a Conclusion of Law
17 is hereby adopted as such.

18 From these Conclusions, the Board enters this

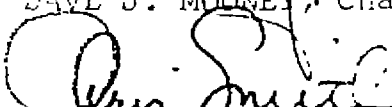
19 ORDER

20 Two \$250 civil penalties are each affirmed.

21 DATED this 29TH day of June, 1979.

22 POLLUTION CONTROL HEARINGS BOARD

23 
DAVE J. MOONEY, Chairman

24 
CHRIS SMITH, Member

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW,
AND ORDER

L. 1

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
ZASER AND LONGSTON, INC.)
(JOHN AND JOANNE HUMBERT),)
Appellants,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent.)

PCHB No. 78-250

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER being an appeal from the cancellation of a portion of
Ground Water Permit No. G3-21892P (QB-174A); having come on regularly
for formal hearing before the Pollution Control Hearings Board on the 13th
day of March, 1979, at Seattle, Washington; and appellant, Zaser and
Longston, Inc., appearing through its attorney, Larry Tracy, and respondent
Department of Ecology, appearing through its attorney, Robert E. Mack,
Assistant Attorney General, and Board members present at the hearing
being Dave J. Mooney, Chairman, Chris Smith and David Akana, and the
Board having considered the sworn testimony, exhibits, records and files

DA/LB

1 herein and arguments of counsel and having entered on the 6th day of
2 April, 1979, its Proposed Findings of Fact, Conclusions of Law and
3 Order, and the Board having served said proposed Findings, Conclusions
4 of Law and Order upon all parties herein by certified mail, return receipt
5 requested and twenty days having elapsed from said service, and

6 The Board having received exceptions and replies thereto and having
7 considered the exceptions and replies, the Board concludes that the
8 exceptions should be denied. With regard to the issue raised by
9 appellant as to the requirement of a second show cause letter, it is
10 noted that the Board reviews the respondent's decision de novo. Even
11 if appellant is correct as to the necessity of a second show cause
12 letter for the unamended permit, the substantive result would be
13 the same.

14 The Board being fully advised in the premises, now therefore,

15 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed
16 Findings of Fact, Conclusions of Law and Order dated the 6th day of
17 April, 1979, and incorporated by reference herein and attached hereto
18 as Exhibit A, are adopted and hereby entered as the Board's Final
19 Findings of Fact, Conclusions of Law and Order herein

20 DONE at Lacey, Washington this 29th day of May, 1979

21 POLLUTION CONTROL HEARINGS BOARD

22 Dave J. Mooney
23 DAVE J. MOONEY, Chairman

24 David Akana
25 DAVID AKANA, Member

26 Chris Smith
27 CHRIS SMITH, Member

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER

CERTIFICATION OF MAILING

I, LaRene Barlin, certify that I mailed, postage prepaid, copies of the foregoing document on the 21st day of May, 1979, to each of the following-named parties at the last known post office addresses, with the proper postage affixed to the respective envelopes:

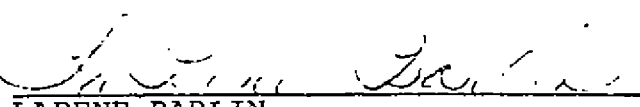
Mr. Larry Tracy
Attorney at Law
P. O. Drawer 610
Moses Lake, Washington 98837

Mr. Robert E. Mack
Assistant Attorney General
Department of Ecology
St. Martin's College
Olympia, Washington 98504

Lloyd Taylor
Dept. of Ecology
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Mr. Greg D. Zaser
Zaser and Longston, Inc.
2939-4th Avenue South
Seattle, Washington 98134

John and Joanne Humbert
2939-4th Avenue South
Seattle, Washington 98134


LARENE BARLIN
POLLUTION CONTROL HEARINGS BOARD

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ZASER AND LONGSTON, INC.
(JOHN AND JOANNE HUMBERT),

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 78-250

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the cancellation of a portion of Ground Water Permit No. G3-21892P (QB-174A), came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, Chris Smith and David Akana (presiding) at a formal hearing in Seattle, Washington on March 13, 1979.

Appellant was represented by its attorney, Larry Tracy; respondent was represented by Robert L. Mack, Assistant Attorney General.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Pollution

Control Hearings Board makes these

FINDINGS OF FACT

I

Appellant Zaser and Longston, Inc. (hereinafter "appellant") is the agent of John and Joanne Humbert, who are the holders of Ground Water Permit No. G3-21892P (QB-174A). The permit authorizes the withdrawal of artificially stored ground water in the Quincy Ground Water Subarea from two wells located within the E 1/2 of Section 1, T. 18 N., R. 26 E in Grant County, Washington and application of water upon portions of the N 1/2 of the same Section 1.

II

The permit, issued in March of 1975, included a development schedule which indicated that the complete application of water was to be made by March 11, 1978. Additionally, the permit contained the following provisions:

"10. This permit is subject to termination or modification, through issuance of supplemental orders of the Department of Ecology, for good cause, including but not limited to:

- a. Violation of a permit condition;
- b. Obtaining a permit by misrepresentation or failure to fully disclose all relevant facts; and
- c. The receipt of new facts or information that dictate that termination or modification of this permit is necessary to comply with the objectives of chapter 173-134 WAC.

11. The permittee shall apply the water to beneficial use hereunder within three years from the date of this permit or the same shall automatically terminate and be of no further force and effect.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

1 The Humbert s accepted the permit as conditioned.

2 III

3 Drilling of two wells authorized in the permit for Section 1
4 was commenced prior to issuance of the permit in March of 1975. One
5 well, located in the NE 1/4 and completed in 1975, produced about
6 2000 gallons per minute (gpm) of water which amount is 400 gpm less
7 than the permit allowed. A second well, located in the SE 1/4 and
8 completed in 1976, did not produce sufficient water for irrigation.

9 IV

10 In 1975 appellant installed a circular irrigation system on each
11 of three quarter sections in Section 1: NW 1/4, NE 1/4 and SE 1/4.
12 The NW 1/4 section was rough-levelled during the same year and a pipeline
13 was installed from the well in the NE 1/4 section to the pivot of
14 the irrigation circle in the NW 1/4 section.

15 V

16 In the spring of 1976 appellant's lessees commenced soil
17 preparation on the N 1/2 of Section 1 and chisel-plowed, i.e., rough-
18 levelled the land but leaving some natural vegetation, the NW 1/4
19 section. At this time, both circles on the N 1/2 of Section 1 were
20 operable and water was applied to the NW 1/4 but not upon or for any
21 crops. Because the well in the NE 1/4 section could not supply the
22 water required to grow appellant's choice of crop, that is, potatoes,
23 over the entire N 1/2 of Section 1, appellant did not farm the NW 1/4
24 and instead diverted water to its SE 1/4 holdings, which is smaller
25 in acreage than the NW 1/4. Crops were raised on the NE 1/4 and
26 SE 1/4 section in 1976. The NW 1/4 section was not further developed

27 FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

1 at that time.

2 VI

3 In 1977, appellant drilled a well in the SW corner of the SE 1/4
4 section. Water sufficient for irrigation could not be found. Appellant
5 thereafter drilled for water in the NW 1/4, taking up its efforts where
6 it had left off in 1974 and 1976. Water sufficient for irrigation was
7 discovered after July of 1978 and the well tested in September of 1978.

8 VII

9 On March 13, 1978, respondent issued a letter notifying the
10 permittees that their permit would be cancelled unless, within sixty
11 days, good cause was shown why the permit should not be cancelled.
12 Appellant responded on May 12 indicating that a circle was installed
13 on each 1/4 section of the N 1/2 but there was not enough water
14 for both circles. Appellant requested an extension of time "to get
15 a well driller to deepen the well to obtain enough water to irrigate
16 the circle on the NW 1/4." By letter dated June 2, 1978, the
17 Department's division supervisor, after finding that work had been
18 prosecuted diligently, authorized permittees an extension to
19 October 1, 1978 "to complete your project and put the water to
20 full beneficial use." Appellant did not do further work on the
21 NW 1/4 portion of Section 1 pursuant to the permit until after
22 receipt of the letter.

23 VIII

24 In the latter part of July, appellant found a well driller
25 who drilled a well in the NW 1/4 section. Water was found and in
26 September the well was tested at 2400 gpm. The evidence does not

27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

show that appellant was possessed of a permit for a well in the NW 1/4 section. On September 27 appellant mailed an application for a change of water right of permit QB 174A to respondent showing the additional well in the NW 1/4 section.

IX

On September 28 appellant's request for an extension of the October 1 deadline was denied by letter. Therein, respondent first wrote the words "growing crops" in connection with beneficial use. Thereafter, appellant tried to get water from the NE 1/4 well to the NW 1/4 section irrigation circle. Parts were missing from the circle and the wiring was not servicable. Although the equipment was substantially repaired, the ground was "still in sagebrush" when the Department inspected the site on October 2, and no crop was visibly planted or growing.

X

On October 10 appellant's application for change in water right was returned. On that same day, an order was issued cancelling that portion of permit QB 174A relating to the NW 1/4 of Section 1. No letter to show cause why the permit should not be cancelled was sent to appellant after June 2 and before October 10, 1978. The order of cancellation was appealed to this Board. In its appeal, appellant requested more time so that respondent could process its application for change of water right to add a new well in the NW 1/4 section in permit QB 174A.

XI

Respondent is of the opinion that crops could have been grown

FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

1 on the NW 1/4 section prior to October 1 and suggests alfalfa as such
2 a crop. Appellant is of the opinion that crops such as potatoes
3 (appellant's first crop choice) and cover crops are planted in the
4 spring; to plant such crops in the fall, it believes, would be a
5 waste of about \$7,200 in planting costs.

6 Appellant did not remove the natural cover on the NW 1/4 section
7 because water was not available in the amount needed for its
8 choice of crops; land so uncovered without application of water,
9 is susceptible to wind erosion. °

10 XII

11 Appellant has spent substantial sums of money to develop the
12 property in Section 1. About \$82,000 was spent on the NW 1/4
13 section, including well drilling, well testing, electrical work,
14 piping and trenching, levelling, repairs, and an irrigation circle.
15 Of this amount, appellant spent \$20,000 during the period of
16 June 2 to October 1 for a well driller (\$7,400) well test (\$2,400),
17 and repairs.

18 XIII

19 Any Conclusion of Law which should be deemed a Finding of Fact
20 is hereby adopted as such.

21 From these Findings, the Pollution Control Hearings Board
22 comes to these

23 CONCLUSIONS OF LAW

24 I

25 Appellant contends that the order of cancellation is void because
26 respondent failed to give it a second opportunity to show cause why the

27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 permit should not be cancelled. See RCW 90.03.320¹ and WAC 173-136-060².

2
3 1. RCW 90.03.320 APPROPRIATION PROCEDURE--CONSTRUCTION
4 WORK. Actual construction work shall be commenced on
5 any project for which permit has been granted within
6 such reasonable time as shall be prescribed by the
7 supervisor of water resources, and shall thereafter
8 be prosecuted with diligence and completed within
9 the time prescribed by the supervisor. The super-
10 visor, in fixing the time for the commencement of
11 the work, or for the completion thereof and the
12 application of the water to the beneficial use
13 prescribed in the permit, shall take into consideration
14 the cost and magnitude of the project and the
15 engineering and physical features to be encountered,
16 and shall allow such time as shall be reasonable
17 and just under the conditions then existing, having
due regard for the public welfare and public in-
terests affected: and, for good cause shown, he
shall extend the time or times fixed as aforesaid,
and shall grant such further period or periods as
may be reasonably necessary, having due regard to
the good faith of the applicant and the public
interests affected. If the terms of the permit or
extension thereof, are not complied with the
supervisor shall give notice by registered mail
that such permit will be canceled unless the
holders thereof shall show cause within sixty
days why the same should not be so canceled.
If cause be not shown, said permit shall be
canceled.

18 2. WAC 173-136-060 PERMITS--PRIORITIES AND CONDITIONS
19 OF RIGHT OF WITHDRAWAL. Every permit issued pursuant to
20 this chapter shall be:

21 (1) Conditioned to insure the protection of public
22 interest and values and of the rights of withdrawal and
23 use established in public waters artificially stored ground
24 waters both prior and subsequent to the issuance of such a
permit.

25 (2) Conditioned to comply with the provisions of the
26 chapter of the Washington Administrative Code containing
27 the water management and regulation regulations for the
specific ground-water area, subarea, or zone to which the
application relates.

28 (3) Conditioned to provide for inspection, monitoring,
29 entry, and reporting of data by or to the department and the
30 holder of an accepted declaration as required by the department.

31 (4) Conditioned to provide that a permit shall be subject

1 The evidence discloses that appellant received a "show cause"
2 letter dated March 13, 1978, a letter of extension dated June 2, 1978
3 and an order of cancellation dated October 10, 1978. From this
4 it is evident that respondent complied with the statutory, regulatory
5 and permit provisions prior to cancelling the instant permit. There
6 was no "order" which modified the terms of the permit. Thus, the
7 show cause letter dated March 13 constituted compliance with the
8 method chosen by respondent to cancel the permit. The letter from
9 respondent dated June 2, 1978 purporting to extend the permit was
10 not an appealable order or an order which formally modified the
11 permit. See Deking v. DOE, PCHB No. 874. Thus, there was no
12 necessity for a second show cause letter to be sent. Even if the
13 letter of extension could be deemed to be an order which modified the
14 permit, there is nothing to show that appellant was prejudicially misled
15 by the procedures used.

16 II

17 Appellant has not shown good cause why the permit should not
18 be cancelled. Development in the NW 1/4 of Section 1 has remained
19

20 Cont.

21 to termination or modification for failure to comply with any
22 agreement, approved by the department, between the permittee
and the holder of a declaration accepted by the department of
ecology pursuant to RCW 90.44.130.

23 (5) Subject to termination or modification, through
24 issuance of supplemental orders of the department, for
good cause, including but not limited to:

- 25 (a) Violation of a permit condition;
- (b) Obtaining a permit by misrepresentation or
failure to fully disclose all relevant facts;
- 26 (c) The receipt of new facts or information dictate
27 the same.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

essentially static since 1975 and 1976 when the pipeline and circle were installed and the ground was chisel plowed. Appellant was aware that water was not available in the quantity desired for the N 1/2 section in the spring of 1976. Rather than use the water for lower-duty crops in the N 1/2, appellant diverted water from the NW 1/4 to the SE 1/4 of Section 1. This was a conscious choice by appellant. It does not show good cause why permit QB 174A should not be cancelled as to the NW 1/4 section.

Appellant's drilling for water in the NW 1/4 was done without a permit and can form no basis to show good cause why permit QB 174A, which does not provide for a well in the NW 1/4, should not be cancelled. Nor does such drilling justify reversing the Department so that appellant's application for change in water right might be processed. In summary, the entire events and circumstances do not justify reversing the Department on the basis of good cause shown.

III

The permit development schedule requires that "complete application of water" is to be made by March 11, 1978. Provision 11 requires that the permittee "shall apply the water to beneficial use" presumably by the completion date of the development schedule or any extensions granted thereto for good cause shown. Under the framework developed by respondent for management of artificially stored ground water in this area, a permittee must actually apply water to the intended beneficial use to retain a permit. In other words, a permittee must actually appropriate water. The evidence shows that appellant did not actually apply water to irrigation within the time set forth in the permit

1 or letter. Moreover, appellant's evidence shows that water could
2 have been applied on the NW 1/4 section in 1976. Through its own
3 choice, the NW 1/4 was not irrigated although it might have been
4 for a crop which required less water. If appellant was not aware of
5 the requirements in the permit, it should have been.

6 IV

7 The Department of Ecology order cancelling permit QB 174A should
8 be affirmed.

9 V

10 Any Finding of Fact which should be deemed a Conclusion of Law
11 is hereby adopted as such.

12 From these Conclusions the Board enters this

13 ORDER

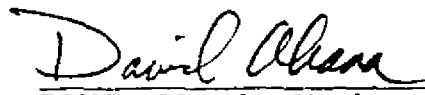
14 Department of Ecology Order of Cancellation of Ground Water
15 Permit No. G3-21892 (QB 174A) is affirmed.

16 DATED this 6TH day of APRIL, 1979.

17 POLLUTION CONTROL HEARINGS BOARD

18 
19 DAVE J. MOONEY, Chairman

20
21 CHRIS SMITH, Member

22 
23 DAVID AKANA, Member

24
25
26 FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ENVIROTECH CORPORATION,

Appellant,

v.

SOUTHWEST AIR POLLUTION
CONTROL AUTHORITY,

Respondent.

PCHB Nos. 78-255 and 79-60

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

These matters, by agreement of the parties, came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, Chris Smith and David Akana, presiding officer, at a formal hearing in Lacey, Washington on April 20, 1979.

Appellant appeared by C. Brent Patten, its Contract Administrator; respondent appeared by its attorney, James D. Ladley.

Respondent moved to dismiss five of the six civil penalties in one matter, PCHB No. 78-255, on the ground that appellant failed to timely file its appeal as to each of the penalties. The record showed that the

NC/LB

1 civil penalties dated August 18, 1978, October 6, 1978 (2), October 12, 197
2 and October 19, 1978 were appealed to this Board more than 30 days
3 after appellant's receipt thereof. Consequently, respondent's motion
4 as to such civil penalties was granted for lack of jurisdiction of
5 this Board to consider those appeals. The remaining civil penalty in
6 PCHB No. 78-255 and a civil penalty in PCHB No. 79-60, consolidated herein
7 by agreement, were thereafter heard.

8 Witnesses were sworn and testified. Exhibits were admitted. From
9 testimony heard and exhibits examined, the Pollution Control Hearings
10 Board makes these

11 FINDINGS OF FACT

12 I

13 Respondent, pursuant to RCW 43.21B. 260, has filed with this
14 Hearings Board a certified copy of its Regulation I containing
15 respondent's regulations and amendments thereto. Official notice
16 thereof is hereby taken.

17 II

18 Appellant, by contract, operates the Westside Sewage Treatment
19 Plant and the Eastside Sewage Treatment Plant in Vancouver, Washington,
20 for the City of Vancouver.

21 III

22 On November 3, 1978 a trained and experienced inspector employed by
23 respondent detected a strong odor in the vicinity of appellant's
24 Eastside Sewage Treatment Plant. He checked his scentometer
25 to be sure it was functioning and followed the odor upwind. He
26 determined the source to be the Eastside Sewage Treatment Center, and

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 took a reading of 170 dilution thresholds, or number four on his
2 scentometer, between 11:11 a.m. and 11:37 a.m., approximately 1/2 mile
3 northwest of appellant's Eastside Plant, adjacent to a motel in a
4 commercial area. Respondent's inspector also detected sewage visible on
5 the ground at the plant. The inspector left a field notice of violation
6 at appellant's office at Westside Sewage Treatment Plant. Subsequently,
7 respondent issued to appellant Notice of Violation and Civil Penalty in
8 the amount of \$250; this notice is the subject matter of PCHB No. 78-255.

9 IV

10 On March 9, 1979, while respondent's inspector was conducting a
11 routine check of the industrial area in Vancouver, he detected a
12 burned odor typical of a heat treatment and burning process of
13 sewage. After respondent's inspector checked his scentometer, he
14 took two readings between 1:15 p.m. and 1:32 p.m., which yielded a
15 170 dilution threshold, or number four on the scentometer. The
16 reading was taken approximately 200 yards northeast of the Westside
17 Sewage Treatment Plant, adjacent to the industrial area. Respondent's
18 inspector determined the source of the odor to be the Westside Sewage
19 Treatment Plant. The inspector gave a field notice of violation
20 to the plant manager; a Notice of Violation and Civil Penalty of
21 \$250 was subsequently issued and is the subject matter of PCHB No.
22 79-60.

23 V

24 Section 5.03 of respondent's Regulation II makes it unlawful
25 any person to allow, cause, let, permit or suffer the emission of
odorous gases from any source exceeding a scentometer No. 0 odor

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 strength or equivalent dilution in residential and commercial areas, or
2 exceeding a scentometer No. 2 odor strength or equivalent dilution
3 in all other land use areas. A violation of the section occurs when
4 two measurements made within a period of one hour, separated by at
5 least fifteen minutes, off the property surrounding the air
6 contaminant source, show that the specified limitations have been
7 exceeded, Section 2.04 provides that any person violating any of the
8 provisions of respondent's Regulation II shall incur a penalty up to \$250
9 per day per violation.

10 VI

11 Any Conclusion of Law hereinafter stated which is deemed to be
12 a Finding of Fact is here with adopted as such.

13 From these Findings, the Pollution Control Hearings Board
14 comes to these

15 CONCLUSIONS OF LAW

16 I

17 Appellant admits in its letter of appeal in PCHB No. 78-255
18 that odors were present at the time of the violation, but urges that
19 since odors have previously been present without receiving notices
20 of violation, considerations of equity demand that the fines be
21 lifted completely. The Board rejects this contention. The fact
22 that the appellant has previously violated the standards of Section 5.03
23 of Regulation II while escaping penalty does not excuse the incident
24 which prompted the Notice of Violation and Civil Penalty under appeal.

25 II

26 Appellant in its letter of appeal in PCHB No. 79-60 maintains

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

that if the odors were present, the responsibility lies with "another party," the City of Vancouver. The Board notes that the language of Section 5.03 of respondent's Regulation II speaks to those who "allow, cause, let, permit or suffer the emission of odorous gases" Since appellant, by contract with the City of Vancouver, operates both the Westside and the Eastside Sewage Treatment Plants, the Board considers that the appellant controlled the plants and so was properly held responsible for the emissions, although it may be that another would also have been cited or otherwise responsible to appellant for payment of the penalty.

III

Appellant was in violation of Section 5.03 of respondent's Regulation II on November 3, 1978 and on March 9, 1979, and in view of the circumstances on each day, the civil penalties of \$250 each are reasonable.

Therefore, the Pollution Control Hearings Board issues this

ORDER

The appeals are denied; the Notices of Civil Penalty, in the amount of \$250 each, totalling \$500, are sustained.

DONE at Lacey, Washington this 5th day of JUNE, 1979.

POLLUTION CONTROL HEARINGS BOARD

Dave J. Mooney
DAVE J. MOONEY, Chairman

David Akana
DAVID AKANA, Member

Chris Smith
CHRIS SMITH, Member

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER